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Supreme Court, U.S.
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No. 01-1573

IN THE

Supreme Court of the United States

David W. Oakley,
Petitioner,

v.

State of Wisconsin.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
I. Certiorari Should Be Granted To Resolve The Conflict Over The Scrutiny Applicable To Probation Conditions Restricting Procreation. 2
II. Certiorari Should Be Granted To Resolve The Conflict Over Whether A Probation Condition Restricting Procreation Is Narrowly Tailored To Further A Compelling State Interest. 5
III. This Case Is An Ideal Vehicle To Decide The Question Presented. 7
CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Austin v. *State*, 183 N.W.2d 56 (Wis. 1971) 9
Carey v. *Population Servs. Int'l*, 431 U.S. 678 (1977) 2, 5
Edwards v. *State*, 246 N.W.2d 109 (Wis. 1976) 3
Ohio v. *Robinette*, 519 U.S. 33 (1996) 4
People v. *Pointer*, 199 Cal. Rptr. 357 (App. 1984) 3, 5, 7
Robinson v. *City of W. Allis*, 619 N.W.2d 692 (Wis. 2000) 9
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 6
State ex rel. Flowers v. *Department of Health & Human Servs.*, 81 Wis. 2d 376 (1978) 7
State ex rel. Martin v. *Barrett*, 248 Wis. 621 (1946) 8
State v. *Mosberg*, 768 P.2d 313 (Kan. App. 1989) 3, 5
State v. *Wachsmuth*, 243 N.W.2d 410 (Wis. 1976) 8
Trammell v. *State*, 751 N.E.2d 283 (Ind. App. 2001) 5
United States v. *Knights*, 534 U.S. 112, 122 S. Ct. 587 (2001) 4
United States v. *Smith*, 972 F.2d 960 (CA8 1992) 3, 6
United States v. *Tolla*, 781 F.2d 29 (CA2 1986) 3
Zablocki v. *Redhail*, 434 U.S. 374 (1978) 3, 4, 6

Statutes

Wis. Stat. § 303.08(1) 9
Wis. Stat. § 973.09(1)(a) 3

REPLY BRIEF FOR THE PETITIONER

The trial judge in this case forbade petitioner from procreating unless and until he first pays, as child support, money he does not have and that he will not have in the future. Although respondent opines that the lower courts did not "limit Oakley's right to procreate nearly as much" as their opinions state because he is merely subject to a probation "condition" (BIO 5) that is set to expire five years hence and that he might even meet (say, if he wins the lottery), here and now petitioner will indisputably go to jail if he fathers a child. Such a prohibition on procreation is a matter of black and white, not nuance, for petitioner can no more procreate "more or less" than his partner can be "a little bit" pregnant. This case accordingly presents an important question regarding one of our most basic rights. And the Wisconsin Supreme Court's decision refusing to apply strict scrutiny and sustaining the no-procreation condition conflicts with precedents of this Court and other courts in both methodology and in result.

By far, the most important element of the Wisconsin Supreme Court's reasoning is so plainly erroneous that even respondent disclaims it. The majority below opined that the state's power to incarcerate petitioner, which would incidentally impinge on his ability to procreate, implies the power to restrict his right to procreate while on probation. See Pet. App. 18a-19a. The Petition having demonstrated the fallacy of that "greater includes the lesser" syllogism (Pet. 24-25), respondent openly abandons the view that "a court can impose a probation condition impinging on procreative rights in any case where the court could have sentenced the criminal defendant to prison" (BIO 18). But with this leg knocked out from under the decision below, nothing of substance remains to support its conclusion that the probation condition in this case represents only an insignificant infringement on petitioner's right to procreate.

Certiorari accordingly should be granted.

I. Certiorari Should Be Granted To Resolve The Conflict Over The Scrutiny Applicable To Probation Conditions Restricting Procreation.

Much of the brief in opposition turns on respondent's misguided attempt to recharacterize the decision below as involving only petitioner's volition: supposedly, like a lightbulb, petitioner can switch on and off his own right to have a child merely by paying as support what little money he has available. *E.g.*, BIO 7. If he has essentially no money, he is subject to no restriction. That simply is not correct: it could not be clearer that petitioner may have a child only if he first shows that he is *actually supporting* his existing children and that he *can support* another child: "the requirement is that Oakley acknowledge the requirements of the law and support his present and any future children." Pet. App. 23a. The condition is not merely that petitioner *wants* to support them, but that "he *can* support" them (*id.* 5a-6a (emphasis added)) and has "the *ability* to support" them (*id.* 8a (emphasis added)). Although respondent does not even attempt to cite or quote any language from the opinion below to support his contrary reading, presumably respondent is relying on footnotes 28 and 29, which address the separate issues of the circumstances that "led to the probation condition" in the first place (*id.* 23a n.28) and thus that describe the steps petitioner must take in order to "stay within the conditions of his parole" so that he is not re-incarcerated for, once again, failing to pay child support (*id.* 23a n.29).

It would make no difference even if the trial judge had imposed, and the Wisconsin Supreme Court had sustained, the narrower probation condition respondent imagines. Time and again, this Court has recognized the profound and fundamental nature of the right at stake in this case. Procreation "is at the very heart" of the rights protected by the Constitution, for it "by definition concerns the most intimate of human activities and relationships" (*Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 685 (1977)), such that it may be abrogated only on the most extraordinary showing. See generally Pet. 14-18. Without gainsaying the seriousness of a willful refusal to pay child support, more would be required to prohibit petitioner from

having a child, particularly when (as in this case) the refusal to pay spans only *four months* and when the state indisputably has other means at its disposal to advance its interests. Particularly in these circumstances, a "'collection device' rationale cannot justify [such a] broad infringement" on the right to procreate. *Zablocki* v. *Redhail*, 434 U.S. 374, 389 (1978).[1]

The Wisconsin Supreme Court nonetheless repeatedly and avowedly held that this unambiguous restriction on petitioner's right to procreate is not subject to strict scrutiny. *E.g.*, Pet. App. 15a & n.23 ("probation conditions--like prison regulations--are not subject to strict scrutiny analysis"); *id.* 22a & n.27 (expressly rejecting dissent's application of strict scrutiny). Respondent's contention that the Wisconsin Supreme Court nonetheless applied some sort of "heightened" scrutiny in this case (BIO 8-9) overreads the Court's statement that "conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation" (Pet. App. 19a) (quoting *Edwards* v. *State*, 246 N.W.2d 109 (Wis. 1976)). The reasonably related standard applies by statute to *every* probation condition. Wis. Stat. § 973.09(1)(a). The court below furthermore emphasized that state law "grants a circuit judge broad discretion in fashioning a convicted individual's conditions of probation." Pet. App. 12a.

The Wisconsin Supreme Court's statement that the probation condition in this case is not "overly broad" (Pet. App. 22a-23a) thus does not *remotely* approximate the holding of other courts that conditions limiting procreation must be "especially fine-tuned" (*United States* v. *Smith*, 972 F.2d 960, 961 (CA8 1992) (quoting *United States* v. *Tolla*, 781 F.2d 29, 34 (CA2 1986))), "narrowly drawn," and "subjected to special scrutiny" (*People* v. *Pointer*, 199 Cal. Rptr. 357, 365 (App. 1984)), because "decisions regarding conception lie within the sphere of choices protected by constitutional rights to privacy" (*State* v. *Mosburg*, 768 P.2d 313, 314 (Kan. App. 1989)).

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[1] Nor, of course, may the government impose a punishment that abrogates a fundamental constitutional right with the *ipse dixit* that the punishment never comes into play if the defendant follows the law.

Rather, the Wisconsin Supreme Court found it sufficient that the condition in this case "does not *eliminate* Oakley's ability to exercise his constitutional right to procreate" (Pet. App. 22a (emphasis added), *quoted in* BIO 5) – and found it sufficient without identifying any special facts suggesting that the condition in this case *was* "narrowly tailored" to achieve a compelling state interest. Notably, respondent does not contest the Petition's showing (at 26-27 & n.18) that many thousands of individuals in this country have indistinguishable child support arrearages. See also *infra* at 6 (detailing conflict with *Zablocki* v. *Redhail*, 434 U.S. 374 (1978)). Respondent's bald assertions that the decision below "is consistent" with these decisions and that "there is little substantive difference in the articulated standards" (BIO 10) are, literally, empty.

The Petition also demonstrated that the lenient standard adopted by the majority below conflicts with this Court's decision in *United States* v. *Knights*, 534 U.S. 112, 122 S. Ct. 587 (2001). Respondent's claim that "*Knights* does not articulate the applicable standard to be applied when addressing whether a probation condition that impinges on a constitution [sic] right is valid" (BIO 11) is wrong: *Knights* holds that there is no special constitutional standard for the probation context. That case, of course, involved the validity of a search under the Fourth Amendment, which calls for an inquiry into the search's "reasonableness" in the "'totality of the circumstances'" (122 S. Ct. at 591 (quoting *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996))); the fact that the case involved a search of a probationer enhanced the state's interest in avoiding criminal activity and reduced the defendant's expectation of privacy. See Pet. 12-14. The fact that the condition in that case was valid as a matter of state law (BIO 12) did not answer the constitutional question. Rather, as respondent is forced to concede (*id.*), *Knights* holds that the probation context simply informs the totality of circumstances; it does not change the applicable legal standard. In this case, by contrast, the Wisconsin Supreme Court avowedly *refused* to apply the standard governing restrictions on the right to procreate, which "may be justified only by a 'compelling state interest' * * * and * * * must be narrowly

drawn to express only the legitimate state interests at stake" (*Carey*, 431 U.S. at 688 (alterations in original)).

Nor is there merit to respondent's suggestion that a more lenient constitutional standard applies in the probation context because probation conditions "appl[y] only to one convicted felon, and not to a broad group of law-abiding citizens." BIO 16. As the Petition explained (at 15-16), but respondent ignores, the fact that probation conditions are imposed pursuant to a trial judge's broad discretion rather than any specific statutory directive (BIO 15-16) renders the restriction on petitioner's right to procreate *more*, not *less*, suspect, for it invites uneven application and invidious discrimination. The further fact that the condition is not expressly directed or authorized by statute (whether in Wisconsin or in any other state) undercuts popular accountability, reduces political checks on abuse, and casts serious doubt on the suggestion that it furthers an important governmental interest.

II. Certiorari Should Be Granted To Resolve The Conflict Over Whether A Probation Condition Restricting Procreation Is Narrowly Tailored To Further A Compelling State Interest.

There could not be less merit to respondent's contention (BIO 13-14) that the decision below does not merit certiorari because other courts have invoked only statutory grounds to strike down probation conditions restricting procreation. Courts have repeatedly found such conditions to be violative of the Fourteenth Amendment.[2] Further, under both state and federal law, the statutory "reasonableness" inquiry is *less* stringent (substantially so) than the Fourteenth Amendment "strict scrutiny" regime. Yet every other court but one has *invalidated* similar probation conditions. See Pet. 10, 18-20 (citing, *inter alia*, *People* v. *Pointer*, 199 Cal. Rptr. 357 (App. 1984); *State* v. *Mosburg*, 768 P.2d 313 (Kan. App. 1989)). A constitutional challenge will *a fortiori* succeed in each of the courts respondent

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[2] See, *e.g.*, *Trammell* v. *State*, 751 N.E.2d 283 (Ind. App. 2001); *State* v. *Mosburg*, 768 P.2d 313 (Kan. App. 1989); *People* v. *Pointer*, 199 Cal. Rptr. 357 (App. 1984).

cites, which in any event rely on constitutional principles. See, *e.g.*, *United States* v. *Smith*, 972 F.2d 960, 962 (CA8 1992) (invoking federal constitutional concerns in its analysis overturning the condition (citing *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942)). The observation that "[e]ach case involving a challenge to a probation condition requires a fact-specific analysis" (BIO 14) not only ignores the conflict over the applicable standard of scrutiny but also overlooks the fact that, whatever standard is applied, other courts have rejected less egregious conditions restricting procreation on less extreme facts and thus would necessarily reject the condition in this case. See Pet. 18-21. Indeed, respondent's statement that "none of these cases presented facts comparable to the present case" (BIO 14) is but a backhanded acknowledgement that this case presents nothing remotely comparable to the instances of child abuse and endangerment that other courts have deemed insufficient to limit procreation.

The decision below also conflicts with *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), which the Wisconsin Supreme Court refused to follow for "the simple reason that the test in *Zablocki* was * * * strict scrutiny" (Pet. App. 16a n.23). Just as in *Zablocki*, the probation condition in this case interferes with the exercise of a fundamental right "without delivering any money at all into the hands of the applicant's prior children." 434 U.S. at 389. Although *Zablocki* details numerous other means to ensure compliance with support orders, the state here did not propose and the trial judge did not consider even such obvious alternatives as requiring petitioner to hold down two full-time jobs. The fact that the state has subjected petitioner to *some* work requirements (particularly requiring him to maintain a job and subjecting him to wage assignments) simply proves petitioner's point: the state-law lien on petitioner's wages already assures that any income he receives will go to support his children.

Indeed, respondent's argument only emphasizes the conflict with *Zablocki*. Respondent contends that, if petitioner intentionally fails to pay his child support obligations, "he will be separately violating a different condition of probation,

requiring that he not commit any crime" (BIO 7), such that the state will then be able to imprison him. That is precisely right, and that very fact renders the prohibition on petitioner's procreation a gratuitous and wholly ineffective restriction on a fundamental constitutional right. The condition's *only* force and effect is to require that, if petitioner *does* have another child without first demonstrating under a wholly uncertain standard that he can support his former children and any new child, he will be sent to jail.[3] The result is to impinge upon his exercise of a basic right for fear of imprisonment and to create the related, horrific prospect that the woman carrying his child will abort for fear of sending petitioner to jail and depriving her newborn of whatever emotional or meager economic support that a working father might be able to provide.

III. This Case Is An Ideal Vehicle To Decide The Question Presented.

The Petition demonstrated (at 27-30), and respondent conspicuously does not dispute, that probation conditions like the one in this case are frequently imposed but rarely appealed because defendants fear that they will be imprisoned if the condition is overturned. Accord Pet. App. 17a n.24 (acknowledging this fact and deriding defendants for lacking sufficient "mettle"). That said, when defendants do appeal they generally prevail in the intermediate state courts and the state either declines to appeal or the state supreme court declines review (as in *People* v. *Pointer*, 199 Cal. Rptr. 357 (App. 1984) (pet. for hrg. in California Supreme Court denied (Apr. 26, 1984))). In conflict with the decision below, the law is accordingly settled in other states that such conditions are subject to strict scrutiny and are invalid. This case accordingly

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[3] The indeterminacy of the standard for revoking petitioner's probation and sending him to jail upon the birth of a child is magnified by the fact that the state is held only to a "preponderance" of the evidence, not proof "beyond a reasonable doubt," in the revocation context. *State ex rel. Flowers* v. *Department of Health & Human Servs.*, 81 Wis. 2d 376, 388 (1978).

presents a rare opportunity for this Court to resolve the important question presented. Contra BIO 8.

Respondent contends that this case is an inappropriate vehicle to decide the question presented because there is no "appellate record" on whether petitioner "was unemployed, impoverished, or unable to obtain employment from January through April of 1998." BIO 1. But those facts are immaterial. The case comes to this Court with petitioner having pleaded guilty of intentionally refusing to pay child support for four months. Petitioner's point is that such a conviction is simply insufficient as a constitutional matter to justify abrogating his right to procreate.[4]

Respondent otherwise misrepresents the record, and seriously so.

First, there manifestly *is* undisputed evidence demonstrating petitioner's substantial compliance with his child support obligations. Contra BIO 2. All of the payment records are official government records subject to judicial notice at any stage of the proceedings (*State* v. *Wachsmuth*, 243 N.W.2d 410, 417 (Wis. 1976); *State ex rel. Martin* v. *Barrett*, 248 Wis. 621, 630 (1946)), and petitioner properly presented them to the Wisconsin Supreme Court, where "[t]he State [did] *not* challenge [petitioner's] statement of the facts about his support payments." Pet. App. 3a (opinion of Abrahamson, C.J.) (emphasis added). In this case, respondent similarly does not dispute the contents of those state records.

Second, petitioner did not "quit [his] employment" after he "was released from custody" (contra BIO 1), a claim that in any event does not affect the question presented. The child support arrearages in this case arose immediately after petitioner's release from prison in December 1997. The BIO cites (but neglects to quote or discuss) a child-support official's testimony

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[4] In any event, to the extent there are any gaps in the record regarding the particulars of petitioner's employment (BIO 1), they reflect the total failure of the state and the trial judge to establish the necessary factual foundation for such an extraordinary restriction of a fundamental right.

that she was "assuming" petitioner's job "terminated" after his "*Huber* privileges" – *i.e.*, the state work release program – ended upon his release. 6/16/98 Tr. 18 (emphasis added). Under state law, because the *Huber* program involves the "employment of county jail *prisoners*" (Wis. Stat. § 303.08(1) (emphasis added)), petitioner lost the job upon his release and his return to his home in another part of the state. It was only at that point that petitioner had no money and "quit paying child support" (BIO 1).[5]

Third, the trial judge *did* recognize that it would be impossible for petitioner to satisfy the child support orders in this case, meaning that he could never satisfy the probation condition. Contra BIO 4. Although it is true that the judge raised the possibility that state law would permit Oakley to apply at a later date to have his support obligations reduced (*id.*), the record citations that respondent offers, but again does not quote or discuss, only *reinforce* the point that even the trial judge recognized that the condition in this case, on the facts as they now stand, prohibits petitioner from having children. 1/13/99 Tr. 23 ("Looking at the orders, it's pretty obvious, and taking into consideration Mr. Oakley's skill, the orders were more than he could afford to pay"); *id.* 24 ("overall it would appear to me that the amounts he's being expected to pay on a weekly basis is [sic] probably more than he could afford to

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[5] In a footnote, respondent asserts that, although a charge against petitioner for child abuse was *dismissed*, it was "read in" against him. BIO 2 n.2 This argument is irrelevant because the Wisconsin Supreme Court did not find that petitioner's prior convictions unrelated to child support nonpayment justified abrogating his right to procreate. That is not surprising, for the so-called "child abuse" was, in its *entirety*, knocking into the son of a person with whom petitioner was arguing, causing the son to suffer a "bump to the top of his head." *State* v. *Oakley*, #97-0021-471, Complaint 1 (6/24/97). Furthermore, as the very case respondent cites explains, the "read in" procedure means that "the defendant does not plead to any charges" but the underlying facts of the charges are simply "considered in sentencing." *Robinson* v. *City of W. Allis*, 619 N.W.2d 692, 702 (Wis. 2000) (quoting *Austin* v. *State*, 183 N.W.2d 56, 58 (Wis. 1971)). Nothing about these events presented a substantial risk that petitioner's sentence would be enhanced.

pay"); *id.* 29 (in any attempt to have the amounts changed, "[i]t may be the judge won't agree with you, maybe the judge will"). The judge simply decided that "a line has to be drawn" (*id.* 25) and that the condition was beneficial because "there's a message that gets sent out to people," including "a lot of people in [petitioner's] situation" (*id.* 25-26). And if that meant "trampling all over [petitioner's] constitutional rights, so be it." *Id.* 30.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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